United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,107

JOHNNIE C. HILL, III, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM CONVICTION UNDER TITLE 22,
SECTION 3204 OF THE D.C. CODE, 1967 EDITION IN
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1969

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QUESTIONS PRESENTED

1. Whether when a misdemeanor is dismissed without prejudice due to a failure on the part of the prosecution to come forward with its witnesses and the prosecution later upgrades the crime to a felony, the prosecution has the affirmative duty of notifying the defendant that it intends to further prosecute the dismissed charge.

2. Whether the delay in indictment for lack of legitimate purpose constitutes a denial of due process of law where that delay causes defendant to lose his witnesses.

3. Whether the statements made by witnesses were so prejudicial as to require a new trial notwithstanding the absence of objections to the statements or a motion for new trial by counsel below.

Rule 8(d) Statement

This case has not previously been before this Court.

TATUTE' INVOLVED

United tates Constitution, Fifth 'endment

> "No person shall be...deprived of life, liberty, or property, without due process of law..."

Federal Rules of Criminal Procedure, Rule 5(a)&(c)

(a) "An officer...shall take the arrested person without unnecessary delay before the nearest available commissioner..."

(b) "...If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. ..."

Federal Rules of Criminal Procedure, Rule 48(b)

(b) "By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

TABLE OF CASES

Cases	Page
*Emerson v. United States, 371 F.2d 955, 125 U.S.App.D.C. 303 (1967)	11,12
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* Cases or authorities chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant stands convicted of carrying a dangerous weapon in violation of Title 22, District of Columbia Code, section 3204. He was sentenced for this charge in Criminal No. 1713-68 on April 11, 1969 to three (3) years to nine (9) years. This appeal stems from that conviction.

Jurisdiction of this Court is envoked under Title 28 of the United States Code, section 1291.

REFERENCE TO RULINGS - None

STATEMENT OF FACTS

NATURE OF CASE

The defendant, Hill, was indicted for carrying a dangerous weapon, found guilty by a jury (Tr. 30) and sentenced to three to nine years (Judgement and Commitment). This is an appeal from that conviction.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On July 21, 1968 the defendant was allegedly carrying a dangerous weapon, and was arrested therefor (Tr. 17, et. seq.).

On July 25, 1968 the defendant was brought to trial in the Court of General Sessions for the misdemeanor of the CDW allegedly committed on July 21, 1968 (Tr. 3). While the defendant was ready to proceed with the trial, the prosecution was not because they had not notified the police officers who made the arrest of the trial (Tr. 3,6). The Court dismissed the case without prejudice (Tr. 3).

On October 28, 1968 the defendant was indicted for the felony of the CDW allegedly committed on July 21, 1968 (Tr. 7). The charge had thus been upgraded from a misdemeanor to a felony.

On November 8, 1968 the defendant was arrained for the above-stated felony (Tr. 7).

On March 10, 1959 the defendant was tried in the United States District Court for the District of Columbia before the Honorable John J. Sirica (Tr. 1) for the felony of CDV. The defendant moved to dismiss the indictment (Tr. 3) because of the long delay before indictment and the long delay before trial, which delay caused the loss of all of the defendants witnesses (Tr. 4,5). This motion was denied (Tr. 5). After the prosecutions case the defendant moved for judgement of acquital which was also denied (Tr. 49), and the jury found the defendant guilty as indicted (Tr. 50).

On April 11, 1959 the Honorable John J. Sirica sentenced the defendant to imprisonment for a period of three to nine years (Judgement and Commitment).

STATEMENT OF FACTS

Police Officers Whited and Lee were on a "Vice Assignment" on July 21, 1958, and at 1:00 P.M. were parked beside 1340 Q Street working a "prostitution assignment in that area." (Tr. 15,17,18 and 37).

Officer Whited observed "...a brief scuffle in the alley... between three negro male subjects and the Defendant ...(was) one of these subjects" (Tr. 19). Whited testified that "It appeared that the Defendant along with another sub-

ject had a hold of one guy..." (Tr. 19). While the prosecutor said "Strike that", the court did not admonish the jury (Tr. 19).

The officers got out of their cruiser and "...observed the defendant with an object in his hand that appeared to be a pistol." (Tr. 19,20). The officer turned to the defendant and the two other subjects and asked them to stop whereupon the defendant turned briefly, walked five feet and threw an object in the churchyard, which Officer Whited identified as a pistol (Tr. 20). Fingerprints of the pistol were not taken (Tr. 30).

Officer Whited then testified that, "There was one round in the chamber." (Tr. 23) and that "It was ready to be fired." (Tr. 23). He identified the magazine containing the bullets, and the bullet that was in the chamber (Tr. 24). He further testified that he saw someone test-fire the pistol (Tr. 24) and identified a certificate issued by the Metropolitan Police Department Range Officer indicating that the weapon did fire (Tr. 25).

Police Officer Lee, in answer to the prosecutor's question, "You recall anything I told you to say, officer?", replied, "Yes... About the fact you had mentioned to leave out

a robbery." (Tr. 45). The court then told the jury to entirely disregard the statement about the robbery (Tr. 47).

The defendant, at the end of the prosecutions case, moved for a judgement of acquittal, which was denied (Tr. 49). The defendant did not take the stand or produce any witnesses on his behalf (Tr. 49).

The jury returned a verdict of guilty and Judge Africa sentenced the defendant to three to nine years (Judgement and Commitment).

ARGUMENT

I. WHETHER WHEN A MISDEMEANOR IS DISMISSED WITHOUT PREJUDICE DUE TO A FAILURE ON THE PART OF THE PROSECUTION TO COME FORWARD WITH IT WITHIN TEN DAYS THE PROSECUTION AFTER UPGRADES THE CRIME TO A FELONY, THE PROSECUTION HAS THE AFFIRMATIVE DUTY OF NOTIFYING THE DEFENDANT THAT IT INTENDS TO FURTHER PROSECUTE THE DISMISSED CHARGE.

The Court's attention is directed to pages 3, 5, and 7 of the reporters transcript.

The Defendant, Hill, was arrested for the crime which is the subject of this appeal on July 21st, 1961 (Tr. 5) and was brought to trial in the Court of General Sessions on July 26th, 1961 (Tr. 3), whereupon the case was dismissed, without prejudice. Hill was not charged again until three months later, October 30th, 1961 (Tr. 7), when the charge was upgraded to a felony and Hill was indicted in the United States District Court for the District of Columbia.

When the court announced that the case was being "dismissed" the defendant had no trouble understanding that the case was over. The words "without prejudice" however, conveyed no meaning whatsoever - it was legal jargon to him. When one walks out of a courtroom, he feels free. He feels that he has already been tried and he may know enough about double

jeopardy to come to the erroneous conclusion that he can not be tried again. He is led to believe that he no longer must keep tabs on the whereabouts of his witnesses. It should be noted that, upon dismissal of the original charge, the [illegible] defendant was not entitled to court appointed counsel to prepare his case, as at that time there was no charge pending.

The defendant was then led into a false sense of security because the Government was derelict. The prosecutor states that the reason for the dismissal was that, "The police officers in this case were not notified." (Tr. 3) and that "...they did not pick up the fact that he had been convicted of a felony in 1956, so the case -- this case was set for trial in the Court of General Sessions on CDP charge" (Tr. 3).

No reason was given for the government's failure to notify the officers or for its failure to pick up the previous felony record of the defendant which was easily accessible, his prior felony having been tried in the District of Columbia. Any injustice that was done was caused by the Government's failure to proceed in a proper and diligent manner.

It would have been a simple process for the prosecutor to tell the accused whether or not the government intended

to continue the prosecution of this case. This would have furthered the cause of justice by enabling the defendant to either dismiss his witnesses or to keep their whereabouts in mind. In the case of a non indigent defendant, counsel could then have been obtained before the defendant was recharged so that he could have prepared his case while the facts were still fresh.

The Government should not be able to hide its decision to go forward with the prosecution of a case or to mask its decision, either intentionally or through a lack of diligence, by having a case dismissed, without prejudice. The Government after making its first charge against a defendant, should have the affirmative duty of letting the defendant know its decision with regard to further prosecution of the matter, so that the means by which he may prepare a defense, i.e. a record of the facts, accessibility of witnesses, etc. do not become lost to him. The famous decisions of Miranda v. Arizona, 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602 (1966), and Escobedo v. Illinois 378 U.S. 478, 12 L. Ed 2d 977, 84 S. Ct. 1758 (1964) prohibit the government from hiding the legal rights of the accused. An affirmative duty is placed on the Government to tell the accused of his right to counsel, thus

assuring his right to the preparation of a proper defense. Likewise the Government should be made to disclose its intentions to prosecute or not to prosecute a defendant after he has first been charged. The knowledge that he is, indeed, to be prosecuted will enable the accused to go forward with every effort to prepare a proper defense, thus complying with the spirit of the Miranda and Escobedo decisions. Secrecy can only cause injustice by either deceiving the defendant into thinking the case has been dropped, or by putting the defendant in a position of confusion, indecision and fear. Finding himself in such a dilemma, he may be forced to expend great sums of money and effort to defend himself in a case which may never even be started.

Justice demands full disclosure by the Government as to its intentions in an existing case.

II. WHETHER THE DELAY IN INDICTMENT FOR LACK OF LEGITIMATE PURPOSE CONSTITUTES A DENIAL OF DUE PROCESS OF THE LAWS THAT DELAY CAUSES DEFENDANT TO LOSE HIS WITNESSES.

The Court's attention is directed to pages 4, and 19 of the recorders transcript and to the Judgement and Commitment and to the Information as to Previous Conviction filed by the prosecution.

When defendant Hill, was first arrested there were two witnesses to the occurrence (Tr. 12) who would have been available to testify. Had Hill been indicted at that time, he would have had the benefit of a preliminary hearing under Rule 5 of the Federal Rules of Criminal Procedure. At that hearing, he would have had the opportunity to introduce evidence on his own behalf, including the two witnesses who were with him at the time he was arrested, thereby preserving and preserving his defense. In the three (3) months which elapsed between the initial charge which was dismissed and the later indictment, Hill lost his ability to locate these two witnesses (Tr. 4). Had the prosecutor acted with what amounts to only ordinary and reasonable diligence, he could have obtained a record of Hill's prior felony conviction, which conviction took place in the U. S. District Court for the District of Columbia, thereby enabling him to indite Hill initially (Judgement and Commitment).

Because the prosecution did not make the slightest effort to obtain Hill's prior record in the District of Columbia, a simple administrative procedure, Hill was needlessly subjected to trial in the D.C. Court of General Sessions where he was without the benefit of Rule 5 of the

Federal Rules of Criminal Procedure, which rule would have allowed the presentation and preservation of testimony by the only two witnesses for the defendant. In addition, Rule 48 (b) of the Federal Rules of Criminal Procedure provides that the court may dismiss an indictment, information or complaint for unnecessary delay in presenting the charge to a grand jury or in filing an information.

During the three month interval between the dismissed charge - dismissed because of the prosecutor's failure to produce the arresting officers as witnesses - and the subsequent indictment, Hill lost contact with his two witnesses and so was unable to produce them for his own defense (Tr. 4).

Three months, in itself, is not a long period of time, but three months of unnecessary procrastination is three months too long. In fact, any unnecessary procrastination which results in one's loss of ability to defend himself is too long.

In Emerson v. United States, 115 U.S. App. D.C. 303 (1957), 371 F.2d 955, the defendant also lost a key witness because of a delay (of only two months) between the initial charge, which was dismissed, and a later indictment

In ruling against Epperson, this court stated that "...the reason for delay and whether it is legitimate must of course be taken into account."

In the Epperson Case, the reason for the delay was legitimate. The prosecution acted diligently, however it was unable to proceed more quickly than it did. F.B.I. "rap sheets" had to be obtained in order to proceed with the indictment. The delay was caused by the time required to obtain those "rap sheets".

In the instant case, however, the delay during which the defendant, Hill, lost his only witnesses, was not the result of a legitimate reason. The prosecutor was not waiting for F.B.I. "rap sheets" as was the prosecutor in the Epperson case. In the instant case the prosecutor had only to obtain the defendant's prior record in the District of Columbia (Information as to Previous Conviction filed by Prosecution).

Because the prosecution did not exercise reasonable diligence and was, instead, derelict in its duty to the public, the defendant, Hill, was denied the opportunity to present his witnesses pursuant to Rule 5 of the Federal Rules of Criminal Procedure, and denied the opportunity to present

his witnesses on behalf of his defense at trial, thus constituting a denial of due process of law.(U. S. Const.-5th Amendment)

III. WHETHER THE TESTIMONY GIVEN BY WITNESSES WERE OF PREJUDICIAL NATURE TO REQUIRE A NEW TRIAL NOTWITHSTANDING THE EVIDENCE OF OBJECTION TO THE TESTIMONY OR A MOTION FOR A NEW TRIAL, BY COUNSEL FOR DEFENDANT.

The Court's attention is directed to pages 17, 11, 13, 23, 24, 37, 31, 41, and 47 of the recorder's transcript.

The defendant, Hill, could not and did not obtain a fair and impartial trial because of the admission of testimony containing a unfettered barrage of prejudicial comments stereotyping him variously as a ruffian, as a felon and even as an armed robber.

Police Officer Whited, in a series of immaterial and irrelevant statements, inferred that Hill was in some way connected with vice and prostitution. Officer Whited's testimony that he was on a "...vice assignment" (Tr. 17), and that, "We were working a prostitution assignment in the area." (Tr. 18) adds nothing to the proof required by the prosecution but serves only to leave the indelible impression on the jury that Hill is connected with those activities, i.e. vice and/or prostitution. Police Officer Lee reinforced this inference by testifying, "We were assigned and working vice in the

econd Precinct." (Tr. 37).

Officer hited then inferred that Hill was a ruffian and a brawler, and was in fact caught in the act of committing an even greater crime then the CDV charged herein, that crime being the unprovoked bodily attack on an innocent party. fter Officer Whited testified that he "...observed a brief scuffle in the alley..." (Tr. 19) in which Hill was involved, he elaborated, "It appeared that the defendant along with another subject had a hold of one guy--" (Tr. 19) thereby projecting the mental image that Hill, along with another person, was either brawling, or mugging an innocent party. Officer Lee added, "There seemed to be a brief struggle." (Tr. 38). It is critical to note that Hill is here being accused of criminal activity without the benefit of a trial on that activity. Hill was never charged with assault and battery or even with disturbing the peace.

Police Officer Robert L. Lee, in answer to the prosecutor's question "You recall anything I told you to say, officer?", replied, "Yes...About the fact you had mentioned to leave out a robbery" (Tr. 46). Through this statement the jury was suddenly made aware of a robbery, the mention of which was as irrelevant, immaterial and prejudicial as was

the statement inferring that Hill bodily attacked an innocent party in an alley. It must be remembered that the word "Robbery" was used after Hill was immaterially and prejudicially placed in an alley, attacking an innocent party, and caught with a loaded gun by police officers on a "vice assignment". The court, in an effort to undo the prejudice caused by this statement, told the jury to disregard it. (Tr. 47). It should be noted that the court did not tell the jury to disregard any of the other above-quoted prejudicial statements. The jury could have inferred from the foregoing that they were to disregard the statement about the robbery, but since nothing was said about the other remarks, i.e. "scuffle," "vice", "prostitution," and "had a hold of one guy," they were to be considered.

Officer Whited, when asked the significance of the "round in the chamber" (Tr. 23), completed the mental picture for the jury by replying, "It was ready to be fired" (Tr. 23). He went on to state, "This is the magazine which contains the bullets and this is inserted into the weapon and this is the bullet that was in the chamber." (Tr. 24). The defendant was a brawler who hung out in alleys, be he a "Robber" or not, had a loaded gun and was ready to use it - probably on the

person he was bodily attacking. Such was the mental picture presented to the jury. Hill was not being charged for armed robbery, or even for assault. He was only charged with CDW. One element of this crime, to be proven by the prosecution, is that the weapon is operable. It is not necessary to show that the weapon was "ready" for use.

The officer's testimony about the round being in the chamber and ready for use exceeded the boundaries of relevance and materiality, and served only to further prejudice the jury against the defendant.

Taken individually, the foregoing statement by Officers Whited and Lee were, at the least, irrelevant and immaterial. Taken as a whole they painted the picture of a ruffian, a brawler and an armed robber, one who was connected with vice and prostitution, one who was ready to use a loaded gun, perhaps to commit murder, and one who should be convicted, not because he may have been guilty of carrying a dangerous weapon, but because of his overall bad character. The inferences created by these statements so clouded the minds of the jurors as to make impossible a fair and impartial determination of guilt or innocence on the charge of CDW.

Although court appointed counsel below did not

object to the above quoted statements, they were so blatantly prejudicial that the interests of justice and fairness can only be served by reversing the judgment of conviction.

CONCLUSION

For the foregoing reasons, appellant respectfully prays that the judgment of conviction against him be reversed, the sentence vacated, and that he be discharged from custody.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellant's Brief was personally served on the United States Attorney this 30th day of July, 1959.

Steven M. Katz

Steven M. Katz
Attorney for Appellant
(Appointed by this Court)